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To Whom It May Concern:

This letter is in response to the proposed regulation "Fiduciary Duties in Selecting Designated Investment Alternatives" (Proposed Regulations) for participant-directed defined contribution retirement plans. We appreciate the Department of Labor's (DOL) work on the Proposed Regulation and its recognition of the difficult tradeoffs plan fiduciaries must make in selecting investment options given the thousands of different options that exist. DOL's guidance will assist plan fiduciaries in making these decisions and help participants understand the process involved when plan fiduciaries make these decisions. This guidance is especially important because the Employee Retirement Income Security Act of 1974 (ERISA) "requires prudence, not prescience,"[1] and it was never meant to judge fiduciary decisions by their outcomes, but rather by the processes by which they were made.

Background

ERISA's drafters did not envision the retirement system we have today when they were debating ERISA's fiduciary provisions. During the ERISA debate, because of Studebaker's demise, the focus was on defined benefit plans, not on defined contribution plans.[2] Furthermore, even though there were nearly twice as many defined contribution plans in 1975 as there were defined benefit plans, defined benefit plans covered nearly three times as many people and most defined contribution plans

[1] DeBruyne v. Equitable Life Assurance Soc'y of the U.S., 920 F.2d 457, 465 (7th Cir. 1990).
[2] See Wooten, James, "The Employee Retirement Income Security Act of 1974 a Political History", Chapter 2, "The Most Glorious Story of Failure in the Business" The Studebaker-Packard Corporation and the Origins of ERISA (2004).

were established as profit sharing plans, with cash or deferred arrangements.[3] Finally, and, most importantly, the investments in both defined benefit plans and defined contribution plans at that time generally were made by the plan fiduciaries on behalf of the entire plan, and, as explained below, it was not until the mid-1990s that participant-directed investments became the norm.[4]

401(k) plans did not exist in 1974 when ERISA was enacted, and they were not part of the law until 1978. At the time they were added to the Internal Revenue Code (Code), their purpose was not necessarily as a savings vehicle for all employees. Instead, this section was added to codify earlier IRS rulings that allowed for cash or deferred arrangements in profit-sharing plans, which were a way for individuals to elect to have bonuses go to a profit-sharing plan on a tax preferred basis.[5] IRS's clarification that salary reductions could be made from ordinary pay and not only bonuses helped pave the way for the modern 401(k). However, it was technology that spurred the adoption of plans with menus of investment options from which participants could make their own investment elections. Specifically, before the 1990s, investments were not valued daily. However, as daily valuation became more common, so did participant-directed 401(k) plans. In addition, the finalization of a regulation under ERISA section 404(c) in 1992 and Interpretative Bulleting 96-1 also may have encouraged this growth.

ERISA's original text with respect to the duty of prudence has not changed since 1974, even though plan designs and plan investment have. Furthermore, even though defined contribution plans have evolved from cash or deferred arrangements where the fiduciaries invested the money on behalf of plan participants to participant-directed 401(k) plans where plan fiduciaries are charged with curating a menu of

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[3] According to DOL, in 1975 there were 103,346 defined benefit plans and 207,748 defined contribution plans. https://www.dol.gov/sites/dolgov/files/ebsa/pdf_files/private-pension-plan-bulletin-historical-tables-and-graphs.pdf. However, in 1975, private sector defined benefit plans had a total of 27.2 million active participants, and private sector defined contribution plans had 11.2 million active participants. "A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector" updated March 25, 2026 available at https://www.congress.gov/crs_external_products/IF/PDF/IF12007/IF12007.3.pdf.

[4] Although ERISA section 404(c) originally was in ERISA, its original intent was different than what it is today. As one of the staff directly involved with ERISA's drafting recalls, it was instead aimed at a subset of plans. Specifically, an entity that ran participant-directed defined contribution plans that typically were sponsored by small professional businesses lobbied to have the provision included so each individual in such plans could "shelter their income from taxation, but … make their own investment decisions without disclosing the actual investments to other members of the profit-sharing plan." "Reflections on ERISA's Fiduciary Provisions: An Integral and Integrated Part of the Statute" Dana M. Muir, 539 Drexel Law Review Vol. 6:539 available at https://drexel.edu/~/media/Files/law/law%20review/Spring2014/Muir_revised.ashx.

[5] "401(k) Plans: A 25-Year Retrospective", p. 4 available at https://www.ici.org/system/files/attachments/per12-02.pdf.

investment options from the thousands of options available, DOL has not issued guidance under 404(a) related to factors that a fiduciary could take into consideration in selecting investment options for a participant-directed 401(k) plans. As noted in the preamble to the Proposed Regulation, DOL first addressed the duty of prudence in a 1979 regulation, just one year after Code section 401(k) was codified, but before it became effective. However, at that time, the focus was on plans where the fiduciary was charged with overall investments for the entire plan and not participant-directed accounts, and especially defined benefit plans.[6]

Unfortunately, because there has been no legislative or regulatory guidance on factors a fiduciary could consider, plan fiduciaries are vulnerable to attack regardless of what decision they make with respect to which, of the thousands of available, investments they include in the plan. As such,

> ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what they do. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given investment style; for failing to divest from stocks with declining share prices or high risk profiles, and for failing to hold onto such stock because high risk can produce high reward; for making available investment options that plaintiffs' lawyers deem too risky, and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach; for choosing what some plaintiffs deem an overly risky annuity to transfer pension obligations, and inversely for choosing the very same annuity those plaintiffs have called prudent. Indeed, while most plaintiffs sue plans for charging allegedly excessive fees in the hopes of outperformance, a new set of cases charge defendants with following the purportedly "in vogue" trend of "chas[ing]" low fees rather than focusing on funds' "ability to generate return."[7]

The Proposed Regulation provides guidance to plan fiduciaries on factors they could consider, as relevant, as part of a prudent process in the initial selection of an investment option on a menu of options for participant-directed retirement plans. The Proposed Regulation is DOL's interpretation of the duty of prudence as it applies to the selection of an investment option, regardless of the asset class or type of investment, and it is within its authority under 29 U.S.C. Section 1104, just as in 1979

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[6] Both the Trump and Biden administrations amended this regulation to reflect each administration's view of environment, social and governance issues relating to both defined benefit plans and defined contribution plans. However, none of these changes gave clear guidance on factors plan fiduciaries could consider in selecting investment options for participant-directed accounts. See 85 Fed. Reg. 72846 (Nov. 13, 2020) and 87 Fed. Reg. 73822 (Dec. 1, 2022).

[7] Brief for the Amicus Curae at 23-24, Ohnemus v. AT&T (8th Cir. Pending).

when it issued the first regulation interpreting fiduciary duties with respect to investment decisions.

Discussion

ERISA's standard of prudence has not changed since 1974, and it requires that fiduciaries discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[8] The Proposed Regulation provides plan fiduciaries guidance with respect to prudence as it relates to the initial selection of an investment for a participant-directed defined contribution plan by listing six non-exclusive factors with examples, as relevant, a fiduciary could consider. This discussion includes general comments applicable to the Proposed Regulation overall and then specific comments relating to each factor.

General Comments

In the preamble and the Proposed Regulation DOL states that the factors are non-exhaustive factors, and there are other factors a fiduciary may take into consideration. However, it is essential for DOL to make clear that there is no one prudent process, and any factors listed in a final regulation are not the exclusive means by which fiduciaries may meet their prudence obligations. Furthermore, DOL should clarify that failure to apply any or all factors does not in any way imply that there was a breach. Thus, language similar to the language in the defined contribution annuity selection safe-harbor regulation that specifically states that compliance is optional and the regulation "does not establish minimum requirements or the exclusive means for satisfying"[9] ERISA's duty of prudence should be included in a final regulation.[10]

DOL may want to consider a prospective effective and applicability date. Although the concepts in the Proposed Regulation are not new, some of the details are. As such, fiduciaries may want time to review their policies and procedures. In addition, depending on the language in the final regulation, fund managers and other

[8] ERISA Section 404(a)(1)(B).
[9] 29 CFR **Section** 2550.404a–4(a)(2).
[10] DOL should make clear that these factors are merely its interpretation of ERISA case law and understanding as it applies to selection of investment options. The use of the term safe harbor is not meant to be an exclusive way of compliance, imply lack of prudence for other approaches, or require that a fiduciary affirmatively establish that it has met each applicable requirement. DOL should explain that although the six factors are listed separately, they are often interrelated, for example, when looking at performance a fiduciary also could look at benchmarks, where appropriate, and will need to examine the fees and participant profiles, needs and preferences.

advisers may need time to develop or adjust written representations or fund offering documents depending on the final regulation. DOL could provide an explicit prospective effective date of 60 days from the date of the final regulation with a 12-month applicability date. DOL also should clarify that nothing in the final regulation is meant to imply that investment decisions made before the date are per se imprudent.

In the preamble, DOL asked whether additional factors should be included, such as participant profiles or characteristics. DOL does not need to add this as an additional factor, but should acknowledge that fiduciaries can, but are not required to, consider participant profiles, characteristics and preferences when looking at other factors.[11] For example, plan fiduciaries may include stable value products for participants who are looking to protect principal and receive a steady and stable return, which makes these particularly attractive for those nearing retirement.[12] On the other hand, younger investors may have different preferences.[13]

The Proposed Regulation uses examples to expand on the descriptions of each of the six factors. Many of the examples also contain general principles that would apply overall to the factor. As discussed in more detail below, we suggest moving the general principles into the text of the final regulation. Also, by moving the general principles into the text of the final regulation, DOL can make the examples more general and remove some of the more specific details so that the examples are illustrative of the factor rather than substantive. Finally, a final regulation should clarify that simply because a given circumstance may not match one of the examples completely, it does not mean that the example or concept may not be relied upon and that not meeting each requirement in an example is not a breach of fiduciary duty.

The Proposed Regulation is asset neutral with respect to types of investments, and the final regulation also should be neutral with respect to the structure of an investment, for example a collective investment trust (CIT) versus a mutual fund. In addition, the Proposed Regulation should recognize the current legal structures of investments are subject to various and different rules and regulators, and DOL should

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[11] Current regulation provides that a fiduciary does not breach its duty of loyalty by considering participant preferences in selection an investment option. See 29 CFR § 2550.404a-1(c)(3). This is equally applicable to the duty of prudence.

[12] Individuals 50 and older own approximately 85% of stable value assets. See "The Facts About Stable Value Funds," updated September 20, 2022, available at https://www.stablevalue.org/the-facts-about-stable-value-funds/.

[13] "Younger Investors Flock to Alts, While Older Investors Remain Cautious", Yasin Mohamud, Aug. 5, 2025 available at https://www.planadviser.com/younger-investors-flock-to-alts-while-older-investors-remain-cautious/.

be neutral with respect to that as well.[14] The examples should recognize these rules and regulators and not impose rules applicable to one type of investment on a different investment where the law does not already do this.

The Proposed Regulation repeatedly states that a plan fiduciary must "maximize risk-adjusted returns, net of fees." In evaluating any potential return on an investment, it should be on a risk-adjusted expected returns, net of fees basis, and a final regulation should reference this and eliminate the phrase "maximize risk-adjusted returns." ERISA does not require a plan fiduciary to maximize each and every return because there almost always will be, in hindsight, an investment that performs better.[15] Moreover, a fiduciary may not always maximize returns for a variety of reasons, such as an investment may have a better quality provider or it is an investment type that is meant to preserve capital. This concept is recognized in the examples, and the text of the final regulation should reflect this by using the term "risk-adjusted expected returns, net of fees." As noted in the preamble to the Proposed Regulation, ERISA requires a prudent process and is not focused on results.[16]

When deciding which investment to select, fiduciaries are not focused on the actual returns, because that can only be known in the future. Instead, the analysis of returns is on the "expected returns" as forward-looking model performance. As such, any reference to returns should be expected returns.

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[14] Over the years, fiduciaries decisions to invest in mutual funds were challenged claiming that the fiduciary should have invested in a CIT because CITs are less expensive. Recently, a new wave of cases has emerged challenging investments in CITs rather than mutual funds claiming that CITs are per se imprudent because the Securities and Exchange Commission (SEC) does not regulate them. Such claims ignore the fact that CITs are subject to ERISA, and they also are regulated by the Office of the Comptroller of the currency and states. See "Comptroller's Handbook AM-CIF Asset Management (AM) Collective Investment Funds", Version 1.0, May 2014 available at https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/collective-investment-funds/pub-ch-collective-investment.pdf. As noted in the Proposed Regulation, DOL recognizes that there is no per se imprudent investment, and one investment should not be favored over another depending on the regulator.

[15] Brief for the Amicus Curae, at 15 Bracalente v. Cisco Systems, Inc. (Appeal from the United States District Court for the Northern District of California Case No. 5:22-cv-04417-EJD) ("But with dozens of TDFs on the market, it cannot be that a court can infer that fiduciaries were acting imprudently simply because a particular suite was purportedly outperformed by a handful of other suites during a discrete time period") (citing Forman v. TriHealth, Inc., 40 F.4th 443, 448-49 (6th Cir. 2022) ("[A] showing of imprudence cannot come down to simply pointing to a fund with better performance.")

[16] 91 Fed. Reg. 16088, 16091 (Mar. 31, 2026) ("Thus, prudence is assessed based on a fiduciary's investigation at the time of the investment decision, and not in hindsight based on the investment results.")

Case law has long recognized that when fiduciaries do not have the required knowledge to make a decision, they must seek the appropriate assistance.[17] In the preamble to the Proposed Regulation, DOL recognizes this principle, but it also seems to apply a presumption to favoring decisions involving an ERISA 3(21) or 3(38) fiduciary.[18] In addition, throughout most of the examples, the Proposed Regulation refers to obtaining advice from an ERISA investment advice fiduciary within the meaning of ERISA section 3(21)(A). The language in the preamble and the repeated reference to an ERISA section 3(21)(A) fiduciary in the examples could be interpreted to mean DOL prefers that type of assistance rather than other types, and any other equally appropriate assistance (or lack of assistance if not needed) would not satisfy the requirements in a final regulation. For example, many large plan sponsors have internal investment experts, and there is no need to hire and pay for such services (which could be additional plan expenses). The examples in the final regulation should instead refer to an investment advice fiduciary, investment manager, or other qualified individuals, if needed or appropriate, and DOL should make clear that it does not favor one type of investment advice over another. DOL also should make clear that where a plan fiduciary has internal expertise, there is no presumption in favor of an outside expert.

Throughout the Proposed Regulations, there are references that a fiduciary must act "critically," "thoroughly," "appropriately," and/or "analytically." Given the subjective nature of such terms, we would suggest that such terms be removed so as not to unintentionally open the door to additional challenges.

Specific Comments

Paragraph (c): Prudent fiduciaries have maximum discretion to select investments to further the purpose of the plan

In the preamble and this title, DOL states that fiduciaries have "maximum discretion" in selecting investment options, which could imply that they have less discretion in other areas or that there may be a higher standard with respect to investment decisions. The intent appears to be that it is the fiduciary, not other entities, such as a court or the plaintiff's bar, who has the discretion to select an

[17] Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983).

[18] 91 Fed. Reg. at 16103 ("The Department notes that with respect to the other safe harbors proposed herein, to the extent a plan fiduciary reasonably relies on recommendations of a prudently selected investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, or prudently delegates compliance to an investment manager within the meaning of section 3(38) of ERISA, that fact will be indicative of a prudent process. However, none of the safe harbors require a plan fiduciary to seek assistance from an investment advice fiduciary or investment manager, regardless of whether such assistance is referred to in the factual discussion of the safe harbor. Rather, the standard is whether the fiduciary has the skills, knowledge, experience, or capacity to understand an investment sufficiently to discharge its obligations under ERISA and the governing plan documents.")

investment option. DOL should consider deleting the phrase "maximum discretion" and replacing it with a more objective statement clarifying that ERISA does not limit fiduciaries' discretion to select investment options if the fiduciary is acting prudently and in accordance with plan terms.

This paragraph specifically provides that ERISA Section 404(a)(1)(B) does not require or restrict any specific type of investment (except those that are illegal), and there is "no per se rule respecting investments in alternative assets generally or the inclusion of private market investments…." It then defines "alternative assets" and "private market investments" with the following:

> direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies, direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate, holdings in actively managed investment vehicles that are investing in digital assets, direct and indirect investments in commodities, direct and indirect interests in projects financing infrastructure development, and lifetime income investment strategies including longevity risk-sharing pools.

Given the evolving nature of what could be considered a private market investment, the final regulation should remove the above language from the proposal and replace it with the following by adding it to the definition section: "Private Market Investment" means "capital investments in assets not traded on public exchanges (such as the NYSE or Nasdaq)."

Paragraph (d): Duty to act prudently when establishing a plan investment menu to maximize risk-adjusted returns

This paragraph provides that a fiduciary with responsibility or authority for selecting a designated investment alternative (DIA) has a duty to "act prudently also when establishing a diversified menu of designated investment alternatives to further the purpose of the plan by enabling participants and beneficiaries in such plan to maximize risk-adjusted returns, net of fees, on investment across their entire portfolios in their plan." This paragraph should be deleted because ERISA Section 404(c) and the underlying regulation address the fiduciary responsibilities associated with an overall investment menu in a participant-directed account.[19]

[19] The 404(c) regulation recognize that devising an overall investment menu option more aptly falls within the duty to diversify the menu so that participants have a variety of investment options from which to select.

If not deleted, the following alternatives are suggested. One alternative is to delete the phrase "maximize risk-adjusted returns, net of fees, on investment across their entire portfolios in their plan," and substitute the following phrase in its place: "achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant and beneficiary." This tracks the language of DOL's regulation under ERISA Section 404(c). There is concern that the "maximize risk-adjusted returns ..." language, if not revised, could be interpreted in a manner that effectively raises the bar of what is currently required of an ERISA Section 404(c) plan.

Alternatively, DOL could delete the phrase "maximize risk-adjusted returns, net of fees, on investment across their entire portfolios in their plan," and the final regulation could clarify that when looking at risk-adjusted returns, it is on a DIA basis, not on the entire portfolio, because otherwise this could conflict with the regulation under ERISA Section 404(c), which provides that the plan must offer at least three different investment risk levels to qualify for relief under Section 404(c).

In addition, if this paragraph is not deleted, this section could be revised by deleting (and everywhere that it appears in the Proposed Regulation) the language "to further the purpose of the plan." This phrase is not part of ERISA, and the only time it has been used was in the 2550.404a-1 Investment Duties rule but without context. Furthermore, because a plan can have more than one purpose, it could unnecessarily complicate the analysis. Finally, because the proposed Paragraph (d) also can be interpreted as a function of the duty of loyalty, meaning that a fiduciary's actions must further the purposes of the plan and not any other purposes, entity, or person, it should be deleted from a final regulation with respect to the duty of prudence.

Finally, in the preamble, DOL asks whether it should issue future guidance relating to what process is required to "curate a prudent menu of investments overall or whether the requirements of the regulations implementing section 404(c) continue to be best practice."[20] DOL should not issue any future guidance on this issue, and the regulation under section 404(c) provides fiduciaries with the guidance needed.

Paragraph (e): Prudence requires appropriate consideration of all relevant factors

The first sentence of this paragraph provides that a fiduciary must follow a prudent process under which it gives appropriate weight to the relevant facts and circumstances. However, it also includes the following clause: "including, where appropriate, with the benefit of analysis of professional advisors like third-party investment advice fiduciaries with the meaning of section 3(21)(A)(ii)." This clause should be deleted. As noted in the general discussion above, a prudent process may

[20] 91 Fed. Reg. at 16094.

or may not require the use of an ERISA Section 3(21) fiduciary, depending on the facts and circumstances. Instead, a fiduciary may decide to use a consultant, or the fiduciary may have the expertise needed to make its own decision. Including a specific reference to an ERISA Section 3(21)(A) fiduciary in the regulatory text could give the appearance that DOL favors one type of entity over another.

Alternatively, the final regulation could remove the reference to the ERISA Section 3(21) fiduciary and add the following sentence after the first sentence: "Fiduciaries who do not have the required knowledge to make a decision can demonstrate a prudent process by seeking the assistance of an appropriate expert."

Paragraph (f): Safe harbor

This paragraph explains that the safe harbor includes a non-exhaustive list that fiduciaries must consider where appropriate. We suggest deleting the reference to "must" and replacing it with "should" and deleting the qualifiers "objectively, thoroughly, and analytically" because these phrases are subject to interpretation and not referenced in ERISA section 404.

Paragraph (f) indicates that where a plan fiduciary complies with the proposed regulation, "the fiduciary is presumed to have met the duties [of prudence]" under section 404(a)(1)(B) of ERISA ... and is entitled to significant deference." In place of the quoted language, the following language should be substituted: "the fiduciary is deemed to have met the duties under section 404(a)(1)(B) of ERISA."

This paragraph also refers to the fiduciary who is "maintaining" the investment lineup. We suggest deleting this reference because it refers to monitoring an investment once it has been selected. In the preamble to the regulation, DOL asked for comments whether the final regulation should include guidance with respect to monitoring investments. Although future guidance subject to notice and comment or a request for information with respect to monitoring an investment once selected may be warranted, the final regulation should not include such guidance because it was not noticed in the Proposed Regulation.

DOL also should make clear that investment advice fiduciaries, investment managers, and consultants may rely on and make use of the final regulation.

Paragraph (g): Performance

DOL should consider adding the following general principles from the examples to the regulatory text:

- Fiduciaries are not required to select the DIA with the highest rate of return.

- It may be prudent to give greater weight to long-term, historic returns, rather than the highest returns during a short or more recent period.

This paragraph provides that the plan fiduciary must "appropriately" consider a reasonable number of similar alternatives and determine the risk adjusted expected returns, over an appropriate time-horizon of the DIA, net of fees and expenses and "further the purposes of the plan by enabling participants and beneficiaries to maximize risk adjusted returns on investment net of fees and expenses."

The term "appropriately" should be deleted because it is up to the fiduciary to determine what is appropriate given the facts and circumstances. Also, the last clause should be deleted because, as noted in the general comment section, fiduciaries do not have an obligation always to maximize returns and certain DIAs may be selected based on other factors.

This paragraph appears to require that fiduciaries develop a projection of future expected performance and volatility measures for each of the DIAs under consideration and select the one with the best projected risk adjusted return (e.g., Sharpe ratio) net of fees. Requiring such projections of future risk-adjusted performance metrics could be inappropriate given the inherent uncertainties associated with forecasting and because risk-adjusted performance metrics applicable to past periods, while informative, are not necessarily predictive.

Instead of requiring such action, the final regulation could allow for examination of past performance and expectations for future performance. In addition, the final regulation should clarifying the performance may be evaluated by the fiduciaries' assessments of various factors that may inform the fiduciaries' reasonable expectations of which investment alternative may be the most likely to outperform the others on a risk-adjusted return basis, net of fees, and need not require the computation of a predicted future risk-adjusted return metrics for each of the DIAs under consideration.

The final regulation also should provide that fiduciaries are able to use discretion in evaluating modeled risk and performance for newer products or using proxies for such assessment. The performance language should also make it clear that examining performance for pre-existing share classes for a strategy is acceptable in assessing the validity of a new share class with the same implementation.

Both of the performance examples focus on target date fund investments. DOL may want to consider performance examples involving other types of investments. In addition, DOL may want to clarify how the performance factor applies to index funds and principal preservation products.

In the analysis of the return example (paragraph (g)(1)), the Proposed Regulation states that "it is often prudent to select a lower-risk investment strategy with a lower expected return." This should be changed to state that it may be prudent, rather than "it is often." It should also state that the actual DIA selection is a facts and circumstances test based on the needs of the plan's participants and beneficiaries.

Paragraph (h): Fees

DOL should consider adding the following general principles from the examples to the regulatory text:

- A fiduciary is not required to consider every similar alternative on the market.
- A fiduciary may take into consideration and rely on factors other than cost, such as, but not limited to, customer service, an investment team, the investment process, performance, communications capabilities, and ratings.
- In the case of DIAs that are mutual funds, a fiduciary should consider the differences in share classes and that different share classes will have different services or fee-sharing arrangements.
- It may be prudent to select an investment with higher fees for lower volatility or a higher rate of return.
- A fiduciary can offer passive DIAs, active DIAs, or both, and neither is per se imprudent.

In the final regulation, DOL should clarify that a fiduciary is not required to separately benchmark various fee components, such as operating and acquisition costs, but should rather determine the expected value of the investment option is reasonable in light of any operating and acquisition costs and that selecting an option with higher costs may not imply imprudence.

In the customer service example (paragraph (h)(1)), the fact pattern lists a specific amount of the difference between the funds, namely ¼ of one percent. As noted in the general section, there is concern that if an example is too specific, some may take it to mean that any deviation from the facts in the example could be used to claim a breach of fiduciary duty. The last sentence in this example should be revised to state that the fund with the superior services costs more, without a reference to a specific amount.

The share class example (paragraph (h)(2)) describes a situation where the fiduciary does not consider the differences in different share classes. This should be revised to explain that in addition to cost differences, different share classes have different value propositions that could be considered. In addition, an example of

revenue sharing related to different share classes would be welcome. In some cases, a plan can obtain a lower net cost by choosing a higher-cost share class and rebating revenue sharing to participants or applying it to pay plan expenses. However, the current example would suggest that fiduciaries always need to select the lowest-cost share class available to the plan.

The lifetime income example (paragraph (h)(3)) compares the same DIA with and without a lifetime income option. This should be replaced with a comparison of different DIAs with similar lifetime income options.

The risk mitigation strategies example (paragraph (h)(4)) describes a situation in which the qualified default investment alternative (QDIA) targets specific percentages of publicly traded stocks and bonds on a public exchange. The ERISA 3(38) investment manager proposes to change the investments to add a specific percentage of hedge fund and private equity investments and reduce the publicly traded investments to mitigate risk and decrease volatility during market downturns. The analysis of this example concludes that although doing so would improve the TDF's risk-adjusted returns, the addition of the hedge fund and private equity sleeve is tantamount to selecting an entirely new investment option, which would require the investment fiduciaries to re-evaluate the TDF as if it were a new investment option.[21]

TDF investment managers make changes in underlying funds and to applicable glidepaths with some degree of frequency for both custom TDFs and off the shelf TDFs. Changing an investment strategy does not necessarily change the purpose of the fund or make it a new DIA. The analysis as written could be understood to infer that every time a modification is made, the plan's responsible fiduciaries are required to conduct a complete re-evaluation of the TDF as if it were a new investment option as a matter of prudence. Such a requirement could be extremely time-consuming and burdensome. Furthermore, the example runs counter to DOL's section 404a-5 participant disclosure regulation, which does not require a new notice each time the underlying investments in an option change. As such, DOL should delete this example under the fees section.[22]

Paragraph (i): Liquidity

DOL should consider adding the following general principles, as modified and explained below, from the examples to the regulatory text:

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[21] 91 Fed. Reg. at 16139.

[22] DOL could consider including this or a variant of it in guidance related to the duty to monitor because the crux of the example relates to monitoring what the investment manager is doing once selected. Alternatively, DOL could use a variant of this example for the proposition that a fiduciary may select a TDF with some of the underlying investments in alternative assets to hedge against market volatility.

- Both participant-level[23] and plan-level liquidity may be relevant.
- For investments that are not registered investment funds for participant-level liquidity the fiduciary may rely on a written representation or information from the fund manager that the fund has adopted and implemented a liquidity risk-management strategy that meets the needs of the plan.
- A fiduciary should look at the overall liquidity of a DIA, not only at a particular investment within a DIA.
- A fiduciary is not precluded from selecting an illiquid product, such as an annuity, but the fiduciary should determine if the lack of liquidity is an appropriate trade-off for the certainty of future payments, and, if applicable, greater monthly payments to meet participants' needs.

There is concern that the participant-level liquidity example (paragraph (i)(1)) implies that all funds must meet the same liquidity requirements as mutual funds, which may not be appropriate for funds that are not mutual funds, such as CITs. The SEC Rule 22e-4 imposes detailed liquidity risk management requirements on most mutual funds (other than money market mutual funds). Generally, Rule 22e-4 requires a mutual fund to assess, manage and review its liquidity risk; classify the liquidity of the fund's portfolio investments into one of four liquidity classifications; determine a minimum amount of the fund's net assets that must be invested in "highly liquid investments"; and limit the fund's investments in illiquid investments to no more than 15% of the fund's net assets. Rule 22e-4 imposes oversight and reporting requirements that are well-suited to '40 Act-registered mutual fund products, but the requirements do not readily fit the governance frameworks of non-registered products. Requiring each non-registered fund to adopt a liquidity risk management program similar to that required under Rule 22e-4 is overly burdensome and unnecessary. The representation should be changed to allow the fund to represent that it has a liquidity management program that has been fully disclosed to prospective investors in sufficient detail to allow fiduciaries to determine whether the fund's levels of liquidity are consistent with plan and participant needs.

In the analysis of the participant-level liquidity, lifetime income example (paragraph (i)(2)), the fiduciary is required to justify the lack of liquidity to the commensurate expected increase in return on investment, certainty with respect to future payments, or both. The wording "justify" should be replaced. Instead, a fiduciary should determine that the lack of liquidity is an appropriate trade-off for the future certainty and increased payments.

[23] DOL also may want to clarify that "round-trip" restrictions aimed at preventing frequent trading by participants would not implicate the participant-level liquidity factor.

The fact pattern in the plan-level liquidity example (paragraph (i)(3)) relates to redemption rights of illiquid products. This example should either be removed, or it should be refined to allow a plan fiduciary to rely on the fund's liquidity risk management program, including the tools the fund uses to manage liquidity and whether it monitors investor concentration.

Paragraph (j): Valuation

DOL should consider adding the following general principles, as modified and explained below, from the examples to the regulatory text:

- For publicly traded DIAs, a plan fiduciary may rely on valuations from a national securities exchange or another similar, public exchange, if it is a generally recognized market where the value is readily, timely, and accurately determinable.
- For publicly traded investments, a plan fiduciary should review the fund's publicly available financial statements and valuation disclosures, but it is not required to confirm compliance with all applicable requirements under the Investment Company Act or other applicable laws. The plan fiduciary should also review the Form N-1A regarding the board's independence.
- For non-publicly traded investments, a fiduciary may rely on a fund manager's written representation or information it provides to the fiduciary that it is valued at least quarterly according to U.S. accounting standards or other professionally recognized standards, as applicable to the investment.
- A fiduciary should review an investment's valuation method and determine whether there is a conflict, and, if so, if the fund has policies and procedures to ensure conflicts in valuation are addressed pursuant to applicable law.

The FASB 820 example (paragraph (j)(2)) appears to illustrate that a plan fiduciary may rely on a valuation of a non-publicly traded investment if the valuation follows generally recognized procedures for measuring fair value, such as FASB 820. However, the fact pattern and the analysis refer to a "conflict-free, independent process" with respect to the valuation, but that term does not appear in FASB 820. We would suggest deleting the reference to a "conflict-free, independent process" and, instead, provide that a plan fiduciary may rely on representations of a conflict-mitigation strategy, including that the fund has policies and procedures to ensure conflicts are addressed pursuant to applicable law.[24]

[24] ERISA recognizes that there may, at times, be a conflict of interest, for example, an employer may be both the settlor and the plan fiduciary. The Supreme Court has recognized that an entity may wear two

The fact pattern in the SEC example (paragraph (j)(3)) provides that the fiduciary reviews the fund's publicly available financial statements and valuation-related disclosure to confirm compliance with all appliable requirements under the Investment Company Act related to pricing and valuation of its shares or otherwise performs appropriate due diligence. This fact pattern should be revised to state that the fiduciary performs its due diligence, such as by reviewing the fund's publicly available financial statements and valuation-related disclosures. Furthermore, it should be made clear that this is at the DIA fund level and not for each underlying investment. A plan fiduciary should not be required to certify compliance with the Investment Company Act for the fund or its underlying investments.

The fact pattern in the conflicts of interest example (paragraph (j)(4)) appears to illustrate how a conflict could arise in the context of a non-publicly traded investment. However, because the fact pattern in this example likely would not apply in the context of a participant-directed 401(k) plan, it would be more helpful to plan fiduciaries to include an example where a fiduciary could determine whether there was a conflict mitigation strategy. Alternatively, the language in example (j)(4) should be clarified to indicate that manager input, in and of itself, would not cause the valuation process not to be "conflict free." Where the valuation process includes manager input that is subject to independent review and validation, the "conflict free" standard should be satisfied.

Paragraph (k): Performance benchmark

DOL should clarify in the preamble that the reference to benchmarking for purposes of fiduciaries selecting an initial investment option is different from the pleading standard that requires a plaintiff to include a meaningful benchmark in its complaint when pleading a breach of fiduciary duty through pleading by inference.[25] When fiduciaries look to a benchmark when initially selecting an investment, they are using past performance as part of the analysis for future, expected returns. However, they are also aware that past performance is not an indication of future performance. With respect to plaintiffs having to include a meaningful benchmark when pleading by inference to indicate a breach of fiduciary duty, this is to show that a fiduciary was not properly monitoring an investment and that the actual performance of the challenged

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hats, however, it must be mindful of how it acts while wearing each hat. See Pegram v. Herdrich, 530 U.S. 211 (2000). DOL has also recognized that conflicts are allowed to exist under ERISA, however, fiduciaries should strive to mitigate such conflicts, but they are not required to eliminate all conflicts. See PTE 2020-02.

[25] Given that the term "meaningful benchmark" is a term of art related to the pleading stage in certain ERISA litigation and the difference between that and how a fiduciary evaluates an investment, the term appropriate benchmark and appropriate comparator should be used instead.

investment was so poor compared to other similar, meaningful comparators that a court could infer that there could have been a breach of fiduciary duty.

DOL also should consider removing the qualifiers as meaningful as possible and best possible, which could invite challenges that the fiduciary did not find the absolute "best" comparator.

DOL should consider adding the following general principles from the examples to the regulatory text:

- If an investment has a non-publicly traded sleeve and publicly traded stocks and bonds, a fiduciary may rely on a benchmark created by an investment advice fiduciary or consultant who is independent of the fund manager.
- A fiduciary may rely on a custom composite benchmark that is a blend of broad-based security market indices representing the asset allocation in the target date fund. [26]

With respect to new or innovative products, DOL should clarify that in addition to comparators, there are other ways a fiduciary may evaluate a new or innovative product, such as comparative performance, peer review, or investment model predictions. In addition, a fiduciary could rely on the advice of an ERISA 3(21) fiduciary or other investment consultant to analyze the asset class or classes risk-adjusted expected returns of such a product using a combination of methodologies commonly used by investment professionals, including modern portfolio theory methods and appropriate capital market assumptions and/or public market equivalent indices.

Paragraph (l): Complexity

The Proposed Regulation lists complexity as a separate factor. However, complexity often is closely related to other factors, such as fees, performance, and benchmarking. If DOL keeps complexity as a stand-alone factor in the final regulation, it should explain the interplay between complexity and other factors.

[26] There is concern that the same custom composite benchmarks described in paragraph (k) are impermissible for purposes of DOL's section 404a-5 participant disclosure regulation. DOL should consider amending the 404a-5 regulation to conform to the benchmarking described in paragraph (k). The section 404a-5 requirement that performance data be accompanied by "an appropriate broad-based securities market index ... which is not administered by an affiliate of the investment issuer, its investment adviser or principal underwriter" does not allow for the use of custom composite benchmarking. It would be inconsistent for allowing the plan's investment fiduciaries to utilize a custom composite benchmark for purposes of selecting an investment option but not allowing the use of the same benchmark for participant disclosure purposes.

The example in paragraph (l)(2) involves the selection of a managed account service as the QDIA. In the fact pattern, a single fiduciary, without any outside assistance, selects a managed account as the QDIA and the only input allowed is age. Although most would agree that this is not a prudent process for selecting a managed account as the QDIA, there is concern that the fact pattern does not reflect how managed account services function in the current marketplace. In practice, these programs incorporate a wide array of participant-level inputs extending well beyond age, such as contribution rates, balances, compensation, and tenure drawn from recordkeeper and employer systems. In addition, participants can generally supplement these data points with individualized information about their preferences and financial circumstances. Managed accounts often also include other features such as personalized guidance on contribution behavior, retirement timing, Social Security election strategies, and income planning. The example may unintentionally convey a view of managed accounts that is not aligned with how they are ordinarily structured or delivered.

DOL should revise this example either by supplementing it with an illustration showing how a fiduciary could reasonably assess and select a managed account service in light of both costs and prospective benefits or by reframing the current example to better reflect common market practices.

Paragraph (m): Definitions

The definition of a DIA in paragraph (m) clarifies that a brokerage window or "self-directed brokerage accounts" does not include investments acquired or available to be acquired through any such arrangements. This definition should be in a final regulation. However, it should be made clear that a brokerage window is a "plan design features chosen by plan settlors," as noted in paragraph (m)(3) with respect to the payment methods in paragraph (m)(3).[27]

Subparagraph (m)(3) also states that a DIA does not include "plan design features chosen by plan settlors, including features that establish the payment method of benefits under the plan." This is very narrow. Instead, the final regulation should state that payout methods that are not annuity or insurance contracts are not DIAs or subject to the fiduciary standards, but rather are plan design, settlor functions.

Conclusion

[27]DOL also should clarify that the decision to amend a plan to add a brokerage window is a settlor function not subject to ERISA's fiduciary rules.

The Chamber appreciates DOL's crafting asset-neutral guidance to assist plan fiduciaries in selecting designated investment alternatives for defined contribution, participant-directed plans.[28] We look forward to working with DOL on this effort to ensure that plan sponsors can continue to offer investment options suited for their participant population.

Sincerely,

Chantel Sheaks
Vice President, Retirement Policy
U.S. Chamber of Commerce

[28] In a separate rulemaking, DOL should consider updating PTE 77-4. PTE 77-4 provides relief for plans investing in affiliated open-end mutual funds, while preserving core protections such as independent fiduciary consent, full disclosure, and the prohibition on duplicative investment management or advisory fees. Nearly fifty years later, however, retirement plan investment structures have evolved significantly to include a range of pooled vehicles and multi-asset products, including target date funds, collective investment trusts, registered funds, private funds, and other structures. Expanding PTE 77-4 beyond open-end mutual funds would better reflect current practices and support an asset - neutral approach consistent with the Proposed Regulation.